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No. 02-575

In The
Supreme Court of the United States

NIKE, INC., ET AL.,
Petitioners,
v.
MARC KASKY
Respondent.

On Writ of Certiorari to the
Supreme Court of California

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AND THE INTERNATIONAL SIGN ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Nancie G. Marzulla*
Roger J. Marzulla
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., NW
Suite 410
Washington, DC 20036
(202) 822-6770

February 28, 2003 *Counsel of Record for *Amici Curiae*

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QUESTION PRESENTED

Amici curiae will address the following question:

Are statements that a corporation issues defending its overseas labor practices in response to public criticism fully protected by the Free Speech Clause of the First Amendment?

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Defenders of Property Rights and the International Sign Association, *amici curiae,* submit this brief in support of petitioners.[1] See Rule 37.3 of the Rules of this Court. Both parties have consented to the filing of this brief.

[1] No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no one other than *amici curiae* contributed financially to the preparation of this brief.

INTERESTS OF *AMICI CURIAE*

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the framers of the Constitution and to promote the exercise of governmental power consistent with the constitutional limitations upon the exercise of that power. Defenders' goal of the vigorous protection of property rights recognizes the special role of federal courts in protecting those rights. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a*

Great Oregon, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The International Sign Association (ISA), based in Alexandria, Virginia, represents manufacturers, users, and suppliers of signs and sign products. ISA exists to support, promote and improve the economically vital sign industry. Effective signs are a critical component of a business' success and a valuable information tool. Commercial speech restrictions permitted under the First Amendment often have a significant economic impact on signs and the value of the property on which the signs are located.

STATEMENT OF THE CASE

In response to criticism of its overseas labor practices, Nike issued public statements, including press releases and newspaper advertisements, defending itself. *See Kasky v. Nike*, 45 P.3d 243, 248 (Cal. 2002). Believing some of the statements to be false, California resident Marc Kasky

brought an action seeking monetary and injunctive relief under the private attorney general provision of the state's unfair competition law that prohibits "not only advertising which is false, but advertising, which although true, is either actually misleading or which has a capacity, likelihood, or tendency to deceive or confuse the public." *Kasky*, 45 P.3d at 247-48 (citing CAL. BUS. & PROF. CODE §§ 17500, 17535). The Superior Court and the Court of Appeal found Nike's public statements to be fully protected noncommercial speech under the First Amendment[2] of the federal constitution and article I, section 2 of the California constitution.[3]

The California Supreme Court reversed, holding that the speech at issue was commercial based on consideration of three elements: the speaker, the intended audience, and the content of the message. *See Kasky*, 45 P.3d at 259. Because

[2] U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech"

[3] Cal. Const., art. I, § 2(a): "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for abuse

"the messages in question were directed by a commercial speaker to a commercial audience, and . . . they made representations of fact about the speaker's own business operations for the purposes of promoting sales of its products," that court held, the messages were commercial speech. *See id.* The California Supreme Court created this test out of whole cloth, based on the ambiguity of this Court's commercial speech jurisprudence. *See Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (recognizing "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category").

SUMMARY OF ARGUMENT

For reasons that appeared to be concocted after the conclusion had been reached, numerous cases have held that commercial speech should enjoy less protection under the Free Speech clause of the First Amendment than noncommercial speech. *See Central Hudson Gas & Electric*

of that right. A law may not restrain or abridge liberty of speech or press."

Corp. v. Public Service Comm'n, 447 U.S. 557, 561 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression"). This distinction, however, has no basis in the text of the Clause. It also has little basis in the Founding Era constitutional commentary. Instead, this "commercial speech" exception to the First Amendment apparently began life as one sentence without citation in a 1942 decision by this Court. *See Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) ("We are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising"). *See also* Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 627 (1990). This complete exclusion of commercial speech from First Amendment protection lasted until this Court's decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), when it was then given limited First Amendment protection on account of its "commonsense differences" with fully

protected speech. *See Virginia State Board of Pharmacy*, 425 U.S. at 771-72 n.24.

This Court has offered three *post hoc* practical rationales for this lesser protection of commercial speech: the relatively easier verifiability of commercial speech, the greater durability of commercial speech in withstanding the chilling effect of speech restriction, and the prevention of commercial harm. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996); *Virginia State Board of Pharmacy*, 425 U.S. at 771-2 n.24.

These rationales for lesser protection cannot withstand scrutiny. For one, commercial speech is not more easily verifiable. *See* Kozinski, *supra*, at 635 ("The idea that commercial speech is more objective than other forms of speech does not survive the most rudimentary reality check.") For another, the assumption that the profit motivation makes commercial speech hardier defies empirical evidence, as history is replete with examples of

how religious, artistic, and scientific beliefs have driven expression. *See id.* at 637 ("[O]ther interests can be just as strong as economics, sometimes stronger.") Finally, using a commercial speech restriction to combat commercial fraud places the court, not the marketplace of ideas, in the role of arbiter of truth, with no relation to the fraudulent transaction the restriction seeks to prevent.

Even if there were a constitutional mandate to accord commercial speech less protection under the First Amendment, any distinction between commercial and noncommercial speech is unworkable. Economic motives are inherently bound up with all types of expression. *See* Loren A. Smith, Jr., *Allen Chair Symposium 1996: The Future of Environmental and Land-use Regulation: Essay: Life, Liberty & Whose Property?: An Essay on Property Rights*, 30 U. RICH. L. REV. 1055, 1062-63 ("The desire to make a buck and the desire to write a poem appear very similar.")

Likewise, the profit motive played a leading role in the establishment of our right to freedom of expression. *See* John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 60 (1996) ("Printers [who convinced Parliament to end the licensing system] . . . naturally sought to protect their interests and limit the prerogatives of government [to suppress publication]"). Other forms of expression demonstrate a similarly close relationship between commercial motivations and the resulting expression. *See* Kozinski, *supra*, at 641 (offering example of how music videos serve to promote record sales). A commercial speech test taking into account the profit motive of the speaker, as adopted by the court below, threatens to curb these forms of expression.

Finally, commercial speech restrictions like those allowed by the court below would have a significant economic impact on the sign industry, whose member companies are as much purveyors of First Amendment

expression as are newspaper publishers and television broadcasters. The sign industry posts $30 billion a year in sales and supports our nations $3 trillion-a-year industry. *See* http://www.signs.org/aboutisa/members.htm (last visited February 21, 2003). The signs produced by this industry transmit information commercial and otherwise, playing roles in maintaining economically health areas and improving traffic safety. *See* R. James Claus, *Traffic and On-Premise Sign Regulation*, 32 SIGNLINE 1, 3-4 (Int'l Sign Ass'n) (2002) (citing J.A. CIRILLO, S.K. DIETZ, AND R.L. BEATTY, ANALYSIS AND MODELING OF RELATIONSHIPS BETWEEN ACCIDENTS AND THE GEOMETRIC AND TRAFFIC CHARACTERISTICS OF THE INTERSTATE SYSTEM (Federal Highway Administration 1969)). Commercial speech restrictions would impede the use of advertisements as an informational tool and would severely impact businesses that are dependent on signs to make economic and beneficial use of their property for no good constitutional reason.

ARGUMENT

I. The Exclusion of "Commercial Speech" From Full First Amendment Protection Has No Basis in the Text of the Constitution and Little Basis in Precedent

The origin of the "commercial speech" exclusion from full First Amendment protection appears to spring from a single sentence in a 1942 opinion of this Court: "We are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising." *See Valentine*, 316 U.S. at 52. This decision was grounded neither upon a textual analysis of the First Amendment nor upon any precedent of this Court.[4]

This Court revisited the issue 34 years later in *Virginia State Board of Pharmacy*:

[4] "The most remarkable aspect of Justice Roberts' opinion, delivered for a unanimous Court, is that it cites no authority. None. Instead, the opinion disposes of the issue in one sentence: 'We are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising.' And so was born the commercial speech doctrine. Without citing any cases, without discussing the purposes or values underlying the first amendment, and without even mentioning the first amendment except in stating Chrestensen's contentions, the Court found it clear as day that commercial speech was not protected by the first amendment." Kozinski, *supra*, at 627.

> While the Court in *Virginia State Board of Pharmacy* did extend a significant degree of protection to commercial speech, it refused to cloak such speech with the full regalia of First Amendment protection. As a result, commercial speech advanced to an improved but still uncertain position within the hierarchy of First Amendment categories. In effect, by sandwiching commercial speech between historically unprotected categories (e.g., libel and obscenity) and categories with longer and more distinguished constitutional pedigrees (e.g., political speech), the Court left it in a state of constitutional limbo.

Sean P. Costello, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 CASE W. RES. L. REV. 681, 681 (1997)

Commercial speech has remained in constitutional limbo ever since *Virginia State Board of Pharmacy*. This Court has held that commercial speech occupies a "subordinate position in the scale of First Amendment values," *see, e.g., Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978), and as such, can be subject to greater restrictions than noncommercial speech. *See Central Hudson*, 447 U.S. at 61 ("The Constitution . . . accords a lesser

protection to commercial speech than to other constitutionally guaranteed expression").

Cast adrift from First Amendment moorings, the court below thought it had distilled from this Court's opinions three reasons for the commercial speech exclusion from full First Amendment protection:

- "First, the truth of commercial speech ... may be *more easily verifiable by its disseminator* than ... news reporting or political commentary..."
- "Second, commercial speech is *hardier* than noncommercial speech in the sense that commercial speakers, because they act from a profit motive, are less likely to experience a chilling effect from speech regulation."
- "Third, governmental authority to regulate commercial transactions to prevent commercial harms justifies a power to regulate speech that is 'linked inextricably' to those transactions." *Kasky*, 45 P.3d at 252-53 (citing *44*

Liquormart, Inc., 517 U.S. at 499; *Virginia State Board of Pharmacy*, 425 U.S. at 771-72 fn. 24)

The first two rationales (ease of verifiability and greater hardiness of commercial speech) sound more like responses to criticism than legal or constitutional reasoning. Moreover, as with most broad generalizations about human behavior, they are highly debatable and exceptions readily come to mind. For instance, human rights activists in Vietnam or Thailand may well be better able to verify working conditions at a plant in their country than the Nike executives in Beaverton, Oregon. Nor is all commercial speech factual in nature and subject to verification.[5] Nor is

[5] As one commentator has noted: "First, we question the notion that it is easier to ascertain the truth of commercial speech. Clearly, this is true in some paradigm cases: It is certainly easier to determine the truth of the claim 'Cucumbers cost sixty-nine cents' than the claim 'Republicans will govern more effectively.' But not all commercial speech is so objective. What about the statement 'America is turning 7-Up'? Is that true? How would you tell? What about the claim that Burger King's hamburgers taste better than McDonalds' because they are charbroiled? That begins to sound more like the claim of a political candidate; it's hard to say that its truth can be easily verified.

The objectivity of commercial speech fades even more when we get beyond old-fashioned 'We make a good product' advertising and consider the way advertising is actually practiced today. What about a

objective verifiability a characteristic unique to commercial speech:

> [T]here are many varieties of noncommercial speech that are just as objective as paradigmatic commercial speech and yet receive full first amendment protection. Scientific speech is the most obvious; much scientific expression can easily be labeled true or false, but we would be shocked at the suggestion that it is therefore entitled to a lesser degree of protection. If you want, you can proclaim that the sun revolves around the earth, that the earth is flat, that there is no such thing as nitrogen, that flounder smoke cigars, that you have fused atomic nuclei in your bathtub -- you can spout any nonsense you want, and the government can't stop you.

Kozinski, *supra*, at 635.

Second, the notion that profit is a stronger motivation to speak than, e.g., religious, philosophical or political conviction, contradicts the history of this nation's founding and the sacrifices of our founding fathers themselves.

television commercial that shows a man using a particular brand of deodorant and, as an apparent result, leading a much more vigorous social life? How could we ascertain the truth of that commercial? Does it even have a truth? It is intended to plant the suggestion in the minds of consumers that this deodorant is a desirable product, but surely a purchaser cannot claim to have been defrauded when he fails to acquire a new group of friends. The notion that commercial speech is any more verifiable than noncommercial speech may once have been true, but it ceased to be so when advertising entered the twentieth century." Kozinski, *supra*, at 635.

George Washington and John Adams neglected their farming businesses to serve the revolution, while Benjamin Franklin, James Madison, Thomas Jefferson and the others risked hanging for treason as the price of signing the Declaration of Independence. Pasternak and Solzhenitsyn continued to write, and Shostakovich to compose, under the very real threat of being sent to the Gulag. Humankind throughout the ages has proved that it is not the love of money, but the love of truth and right that appears to be the strongest motivation of our race.[6]

Third, although government may certainly act to prevent commercial fraud, the statute at issue goes much farther, outrunning this rationale for its existence. Mr. Kasky

[6] "History teaches that speech backed by religious feeling can persist in extraordinarily hostile climates; sacred texts survive in places where dire consequences attend their possession, consequences that would easily overcome a mere profit motive. Artistic impulses can also cause expression to persist in the face of hostile government regulation." Kozinski, *supra*, at 637.

does not allege that he was defrauded, or that he would have bought Nike shoes had he believed that the company treated its Asian workers fairly. Had he been able to directly link the statements to a proposed or completed fraudulent transaction, First Amendment protections would certainly not obtain because it is the transaction, not the speech, which is unlawful. By converting the speech itself into the unlawful act, completely divorced from the sale of products or their qualities, the California legislature adopted a statute that is violative of the First Amendment.

CAL. BUS. & PROF. CODE § 17200 makes illegal "any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, or untrue or misleading advertising," including false advertising, already prohibited under CAL. BUS. & PROF. CODE § 17500.[7] Through the device of the private attorney general under CAL. BUS. & PROF. CODE §§

[7] The California false advertising law also prohibits "not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." *See Kasky*, 45 P.3d at 250.

17204, 17535, Mr. Kasky is able to place before the California courts the abstract question of how Nike's Asian workers are treated, quite independently of any commercial transaction at all. Although it must be admitted that corporate ethics may influence sales, this would not seem to convert the power to prevent consumer fraud into the power to control corporate ethics—let alone what corporations say about their ethics. Let stand, the opinion below would authorize the courts of California to inquire into statements made regarding the marital and sexual mores of Nike's management, their health, church attendance, demeanor, and whether they are good parents—all of which might conceivably affect a consumer's choice of shoes or apparel.

This California statute abandons the marketplace of ideas for the majesty of the courtroom, placing judges in the role of arbiter of the truth. Commercial speech is afforded less protection, apparently because it is too important to be left to the populace. California appears to have decided that the relative merits of laundry detergent or pickup trucks

cannot be left to the consuming public (already armed with the right to sue for fraud), but must be determined by courts even in the absence of any connection to a commercial transaction. By exalting "commercial truth" above political, scientific or artistic truth, California has turned the First Amendment on its head. As one eminent commentator states:

> These cases have made it abundantly clear that no principled line can be drawn between speech directed to making money, and speech directed to espousing a political position. Any rationale that will allow you to suppress one will allow you to suppress the other. First Amendment theory has reluctantly been drawn to this logic. The reluctance has been in large part due to the hostility modern legal theory has borne towards property rights and profit-making. Somehow it was not as acceptable to advertise a soap as to promote a candidate, even if the candidate was "dirty" and the soap was clean. Chief Justice Rehnquist captured the essence of this attitude when he noted in *Dolan v. City of Tigard* that there is "no reason" why one right protected under the Bill of Rights "should be relegated to the status of a poor relation" of other, more frequently cited rights also protected by those constitutional provisions.

Smith, *supra,* at 1062-63.

II. As This Case Demonstrates, the Constitutional Distinction Between Commercial and Noncommercial Speech is Inherently Untenable and Should Be Discarded to Safeguard The Right to Free Speech

Even if there were a supportable distinction between commercial and noncommercial speech under the First Amendment, such a distinction necessarily raises the question of how to distinguish between the two, a question that courts has not been able to definitively answer. This Court has acknowledged the difficulty in fashioning a clear-cut distinction between commercial speech and noncommercial speech. *See Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (recognizing "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category").

The court below based its holding that Nike's public statements were forms of commercial speech on a three-part test it developed on its own, loosely based on a previous three-part test once employed by this Court. See B*olger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67. (1983) (the

combination of three factors—advertising format, product references, and commercial motivation—provided "strong support" for characterizing the speech at issue as commercial speech). The test adopted by the court below required consideration of three elements: the speaker, the intended audience, and the content of the message. *See Kasky*, 45 P.3d at 247. Because "the messages in question were directed by a commercial speaker to a commercial audience, and . . . they made representations of fact about the speaker's own business operations for the purposes of promoting sales of its products," that court held, the messages were commercial speech. *See id.* at 259.

The definition of "commercial speech" announced by the California Supreme Court is circular: under that definition, commercial speech turns out to be anything Nike says. By defining excluded commercial speech as messages from a "commercial speaker" to a "commercial audience" regarding company activities or operations, the court below simply stripped commercial companies of First Amendment

protection.[8] The only way Nike can speak is through its agents who are, by definition, "commercial speakers." The audience of a commercial speaker would appear to be (at least under the definition used by the court below) "commercial," and the subject matter of the message inevitably would deal with the company itself (which makes commercial products). Excluded "commercial speech," as defined by the court below, is thus revealed to be whatever a commercial entity speaks. Should Nike announce a position on virtually any political, scientific or social issue, that position might influence prospective shoe buyers—and confer upon the California courts the ability to determine the veracity of the statement.

The exclusion of "commercial speech" thus undermines the very foundations of free speech. Commercial

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[8] The court below seemed to recognize the impropriety of this result when it stated: "Our dissenting colleagues are correct that the identity of the speaker is usually not a proper consideration in regulating speech that is entitled to First Amendment protection, and that a valid regulation of protected speech may not handicap one side of a public debate." *Kasky*, 45 P.3d at 261.

motivations are invariably and inextricably intertwined with all forms of expression. Many motives, including profit, can prompt expression on any issue, and "human motives cannot be separated by any objective test." *See* Smith, *supra,* at 1062-63.

Indeed, it might properly be said that commercial speech has played a leading role in the establishment of our right to freedom of expression. In 17th and 18th century England, printers faced loss of income when government suppressed publication. *See* McGinnis, *supra,* at 60. Accordingly, the printers relied on property rights arguments in their successful efforts to convince Parliament to end the licensing system and the general warrants by which government seized printed material. *See id.* at 61 ("The notion of information as property came naturally to printers and played a prominent part in their arguments for freedom"). In defending freedom of the press, these Whig printers couched their arguments in the language of economic rights, rightly understanding that economic motives often

drive and enable the dissemination of information on matters political, commercial, and otherwise. *See id.* Accordingly, no court has held that there exists a commercial press exception to the Free Press Clause.

Other forms of expression demonstrate a similarly close relationship between commercial motivations and the resulting expression. *See* Kozinski, *supra*, at 641 (providing example that fully protected music videos promote record sales). Newspapers and broadcast television, the heirs of the aforementioned Whig printers, disseminate information on political affairs with a view to increasing sales, attracting paying advertisers, and generating ratings. In these cases, profit motivation and economic transactions are essential to the transmission of the resulting expression. *See* McGinnis, *supra*, at 91. A commercial speech test taking into account the profit motive threatens to curb these forms of expression.

Some advocates of restricting First Amendment protection to political speech have abandoned this position because of this untenable distinction: "[T]he discovery and

spread of what we regard as political truth is assisted by many forms of speech and writing that are not explicitly political." ROBERT H. BORK, THE TEMPTING OF AMERICA 333 (1990).

It is, in the end, impossible to define "commercial speech" in constitutional terms because the phrase has no constitutional meaning. Commercial speech is so intertwined with all other speech that any definition intended to exclude it from First Amendment protection must fail. The decision that Nike may not freely speak out on a topic of great public importance in which the company is involved cannot stand because the result is inconsistent with bedrock constitutional principles.

III. Commercial Speech Restrictions Allowed Under the California Supreme Court's Test Would Have a Significant Economic Impact on the Sign Industry.

Signs advertise the nature and location of establishments, goods and services—generally commercial ones. Signs are the medium that carries the message of the

"commercial speaker" to the audience. That message may well say "Finest Food in Town," "Have Fun," or "Lowest Prices." Under the decision of the court below, the owners of these signs are subject to suit, and may be required to prove through admissible evidence the validity of their sign's messages.

Like the aforementioned purveyors of First Amendment-protected expression, i.e., newspaper publishers, television news broadcasters, writers, and musicians, sign makers use material property to disseminate information to earn a living. The sign industry, composed of manufacturers and suppliers of on-premise signs and sign products, is a $30 billion a year industry. *See* http://www.signs.org/aboutisa/members.htm (last visited Feb. 21, 2003). The electric sign industry alone reached a record sales volume of $4.6 billion in 1997. *See State of the Industry Report*, SIGNS OF THE TIMES (July 1997). Computer-aided sign makers, another sector of the sign industry, generated an estimated sales volume of $3.6 billion

in 1997. *See The CAS/Commercial State of the Industry Report*, SIGNS OF THE TIMES (1997).

The commercial signs produced by this industry transmit information, and this exchange of information creates the market for the products being advertised. *See* McGinnis, *supra*, at 55. The sign industry thereby supports our nation's $3 trillion-a-year industry. *See* http://www.signs.org/aboutisa/members.htm (last visited Feb. 21, 2003).

Signs play an important role in creating and maintaining economically healthy commercial districts. *See* R. James Claus, *Traffic and On-Premise Sign Regulation*, 32 SIGNLINE 1 (Int'l Sign Ass'n) (2002). Also, commercial signs confer additional non-economic benefits like traffic safety based on their function as a medium of information, benefits that would be put at risk by the Court's lesser protection for commercial speech. *See* Claus, *id.* at 3-4 ("High-rise signs located at high traffic volume intersections increased safety, provided they were conspicuous, . . .legible,

. . . and recognizable") (citing J.A. CIRILLO, S.K. DIETZ, AND R.L. BEATTY, ANALYSIS AND MODELING OF RELATIONSHIPS BETWEEN ACCIDENTS AND THE GEOMETRIC AND TRAFFIC CHARACTERISTICS OF THE INTERSTATE SYSTEM (Federal Highway Administration 1969)). Commercial speech restrictions given a constitutional pass would impede the use of advertisements as an informational tool.

Commercial speech restrictions have an especially significant economic impact on the owners of on-premise signs. Many property owners operating businesses on their property depend on on-premise advertising to make beneficial and productive use of their property. A study conducted between 1995 and 1997 by the University of San Diego on the effects of on-premise signs on the financial performance of retail sites concluded that such signs had a "financially substantive impact on the revenues of a site." *See* THE ECONOMIC CONTEXT OF ON-PREMISE BUSINESS SIGNS AND HOW TO ESTABLISH VALUE IN THE MARKETPLACE 28 (The Signage Found. for Econ. Excellence), *available at*

http://www.signagefoundation.org/economic/economictoc.html (last visited Feb. 21, 2003) (citing *Research on Signage Performance* (Univ. of San Diego School of Bus. Admin. 1997)). Among other things, the study concluded that changes to building signs, whether additions or replacements of signs, increased weekly sales by 5 percent. *See id.* at 30. Also, the addition of small directional signs indicating entrance and exit routes to retail locations increased weekly sales 4 to 12 percent. *See id.* Based on these findings, the study predicted that one additional sign installed on a site would lead to a 4.75 percent increase in annual sales. *See id.* at 29. Signs as a form of commercial speech are an integral economic component of property use.

Commercial speech restrictions thus impinge on the ability of these property owners to make economic use of their property. As this Court has held, "[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has

suffered a taking." *See Lucas v. South Carolina Coastal Council*, 507 U.S. 1003, 1018-19 (1992). Lesser protection for commercial speech thus exposes commercial property owners to significant economic risk.

CONCLUSION

For all these reasons, *amici curiae* urge this Court to reverse the decision below.

Respectfully submitted,

Nancie G. Marzulla*
Roger J. Marzulla
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., NW
Suite 410
Washington, DC 20036
202-822-6770

February 28, 2003 *Counsel of Record for *Amici Curiae*